90-309

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ANNE M. HART, GILLIAN ELAINE HART,
and VERA LEE HART,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the discretionary function exception to the Federal Tort Claims Act apply to the non-discretionary execution of discretionary decisions?

2. In reversing a grant of summary judgment, may an appellate court ignore applicable state law and undisputed facts of record?

LIST OF PARTIES

The parties to the proceedings below were the Petitioners, ANNE M. HART, GILLIAN ELAINE HART, and VERA LEE HART, and the Respondent, UNITED STATES OF AMERICA.

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The petitioners, Anne M. Hart, Gillian Elaine Hart, and Vera Lee Hart, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on March 1, 1990, petition for rehearing and suggestion of rehearing en banc denied April 27, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 894 F.2d 1539, and is reprinted in the appendix hereto, p. 1a, *infra*.

The memorandum decision of the United States District Court for the Northern District of Florida dated

January 12, 1988, is reported at 681 F. Supp. 1518, and is reprinted in the appendix hereto, p. 19a, *infra*.

The memorandum decision of the United States District Court dated October 20, 1988 is not reported, but is reprinted in the Appendix hereto, p. 28a. *infra*.

JURISDICTION

Invoking federal jurisdiction under the Federal Tort Claims Act, 28 U.S.C., Sections 1346(b), 2671-80, the petitioners brought the suit in the Northern District of Florida. On January 12, 1988, the Northern District granted ANNE M. HART'S motion for partial summary judgment and subsequently entered judgment for all petitioners. See p. 19a, *infra*.

On respondent's appeal, the Eleventh Circuit, on March 1, 1990, entered a judgment and opinion reversing the Northern District's grant of summary judgment and remanded with instructions to enter judgment for the respondent. See p. 1a, *infra*. A petition for rehearing and suggestion of rehearing en banc was timely filed by petitioners, but denied on April 27, 1990. See p. 39a, *infra*.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked under 28 U.S.C., Section 1254(1).

STATUTES INVOLVED

28 U.S.C., Sections 1346(b), 2671-80. See p. 40a, *infra*.

STATEMENT OF THE CASE

On December 21, 1972, a United States Air Force AC130 aircraft engaged in enemy fire over Pakse, Laos. Sixteen manifested crew members were aboard, one of whom was Lt. Col. Thomas T. Hart, III, the husband, father, and son, respectively, of the petitioners, Anne M. Hart, Gillian Elaine Hart, and Vera Lee Hart. Two crew

members parachuted to safety and were rescued the night the plane crashed. The hand and forearm of another crew member was found the next day. He was listed as killed in action (KIA) with the other thirteen crew members listed as missing in action (MIA). Indigenous personnel found five other open parachutes and two piles of bloody bandages. They also found the remains of five to six individuals which were then buried in a common grave. Approximately five months after the crash, American reconnaissance aircraft flying over northern Laos photographed a large area of grass or vegetation in the configuration of either "1973TH" or "1573TH". Military intelligence analysis of this photograph contains specific reference to then Capt. Thomas Hart.[1]

In December, 1982, the National League of Families visited the crash site and found two bone fragments. Mrs. Anne Hart, a member of the visiting delegation, turned these remains over to United States government officials who, in turn, sent them to the United States Army Central Identification Laboratory, Hawaiian Islands, (CILHI). These two bone fragments, incredibly, were subsequently included in the set of remains identified as Lt. Col. Thomas T. Hart, III.

In February, 1985, a joint excavation of the Pakse crash site was conducted by the United States and Laotian governments. Bone fragments and other materials were recovered and transferred to CILHI for processing. The excavation team did not discover the common grave. CILHI issued recommendations for positive identifications of all thirteen MIAs. Mrs. Anne Hart was notified by Air Force Casualty on July 1, 1985, that her husband had been positively identified and that he was, indeed, dead. She asked for the opportunity to have an expert

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[1] Brigadier General Shufelt of the Defense Intelligence Agency filed a declaration which, as the District Court noted, ignored this crucial information. See p. 21a, *infra*.

forensic anthropologist examine the remains at her own expense. This request was summarily denied.

Mrs. Hart brought suit in the Northern District of California against Vernon Orr, then Secretary of the Air Force, to enjoin the transfer of all thirteen sets of remains until an expert forensic anthropologist had the opportunity to make his examinations and render his opinions. Dr. Michael Charney, Emeritus Professor of Anthropology, Colorado State University, subsequently examined the purported remains of Lt. Col. Thomas T. Hart, III, and concluded identification was impossible. In fact, Charney could not tell if the remains were from one individual or several individuals. A temporary injunction was issued, but Judge Orrick subsequently dissolved the injunction based upon Secretary Orr's attorney's assurances that the remains would be held as unclaimed in a mortuary storage facility.

An evaluation team consisting of three board certified forensic anthropologists was formed to review the personnel and procedures of CILHI and to specifically review the documentation of the Pakse identifications. Prior to the evaluation, the office of the Secretary to the Air Force sent a letter to Mrs. Hart amounting to an ultimatum for her to bury the remains or the Air Force would bury them "with full military honors" at Arlington National Cemetery. Letters from Mrs. Hart's attorney in California (Howard DeNike) to the Air Force attorneys reminding them of their assurances to Judge Orrick that the remains would be held as unclaimed in a mortuary storage facility and putting them on notice that their actions were causing Mrs. Hart extreme emotional distress, went unheeded. Mr. DeNike pointed to relevant Air Force regulations which would preclude the action the Air Force intended to take. Another letter was sent to Mrs. Hart from the office of the Secretary informing her of the planned burial of "her husband" and giving her a toll-free number to call to make arrangements

to attend the funeral. Mrs. Hart was finally successful in getting the Air Force to postpone (not cancel) the burial until after the evaluation team issued its report on the CILHI.

The report issued by the evaluation team discredited eleven of the thirteen identifications based upon the team's review of the documentation involved. One of the team members, Dr. William Maples, subsequently examined two sets of actual remains and concluded that the documentation prepared by CILHI officials attributed physical characteristics to the remains that simply did not exist.[2]

Dr. Maples' subsequent testimony before the U.S. Senate Committee on Veterans' Affairs pointed to other falsifications of the anthropological narratives issued by CILHI in the Pakse incident.[3]

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[2] In his report, Dr. Maples states: "When we did the CILHI evaluations, the three of us agreed that without seeing the remains, when the files indicated that certain features were present and evaluated by the CILHI anthropologists, we must assume that they saw what they described and the resulting estimates were accurate given the limitations of the various established techniques. *Now after seeing two sets of the Pakse remains, I must conclude that our assumption was not justified.*" (Emphasis in the original). His report concluded: "There is no convincing scientific or circumstantial evidence that suggests that the fragments . . . came from the same individual. The identification of Lt. Col. Hart is not positive. It is not even probable."

[3] *"Live Sighting" Reports of Americans Listed as Missing in Action in Southeast Asia: Hearings before the Senate Committee on Veterans' Affairs*, 99th Cong., 2d Sess. (1986). "Well, the amount of variation that they allowed in their estimates was totally inadequate, and even someone in introductory courses in human osteology would not be allowed to write a report inferring such accuracy from this type of evidence." at p. 73. "Some (remains) are burned, some are not. In the reports, the reports say that the remains were sorted by texture, by burning, and by location of the excavation, and they are attributed to one individual. In this case we have a burned bone and we have unburned bones. Texture-wise, there is a remark-

The public outcry [4] that followed the exposure of the abuses in the identification process, forced the government to rescind the "positive identification" of Lt. Col. Hart. The Government refused, however, to return him to an "unaccounted for" status.

Petitioners filed suit in the United States District Court, Northern District of Florida, alleging that the United States was liable for damages under the Federal Tort Claims Act, 28 U.S.C., Sections 1346(b), 2671-80, for the intentional infliction of emotional distress, as that tort is defined under Florida law. The complaint alleged, among other things, that the action of the Army and the Air Force in making a knowingly false "positive" identification of Lt. Col. Hart's remains, the persistence in that identification in the face of overwhelming evidence to the contrary, the issuance of improper ultimatums to bury those remains as Lt. Col. Hart, and the refusal to return him to an "unaccounted for" status after the recission of the identification, constituted "conduct so outrageous in character and extreme in degree as to go beyond all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community."

The government filed a motion to dismiss, alleging the court lacked subject matter jurisdiction. The government argued plaintiffs' claims were non-justiciable, and that the discretionary function, misrepresentation and deceit, and the combatant activity exceptions to the Fed-

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able difference in these bones. There seems to be a lot of windowdressing in these reports and little substance." at p. 72. "Looking at the printed reports coming from the Laboratory, several of us have found some misleading statements in them." at p. 65.

[4] Senate and House of Representatives hearings, numerous newspaper articles, magazine articles and television documentaries all evidence the national reaction to these false identifications was that they were "outrageous."

eral Torts Claim Act, 28 U.S.C. Sections 2680(a), (h), and (j), precluded suit.[5]

The Court, after full hearing on February 26, 1987, ruled that although it was within the Secretary's discretion to provide for the identification of service remains, once having undertaken that identification it had to be accomplished with due care and could not be unreasonable.[6]

After the government filed its answer admitting many of petitioners' allegations, petitioners filed a request for admissions on May 29, 1987. The court issued its scheduling order on June 11, 1987, directing that the parties conduct discovery so that the due date of any discovery requested shall not be later than September 9, 1987. On September 10, 1987, the government answered petitioners' request for admissions. Petitioners filed a motion to strike these answers and also filed their motion for partial summary judgment. The government's response to petitioners' motion to strike alleged an informal agreement between attorneys for an extension of time, which petitioners' attorneys flatly denied. Petitioners' motion to strike was granted and the requested admissions were deemed admitted.[7]

On January 12, 1988, the District Court ruled that the government was liable to Anne M. Hart under the Florida law for having committed the tort of intentional infliction

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[5] Indeed, the government attorney even insisted that Mrs. Hart had no standing to maintain this action as she was not the next of kin to the remains involved as they were "not her husband."

[6] Even the government recognizes this duty of reasonableness and due care owed to the next of kin. H.R. Rep. No. 94-1764, 94th Cong., 2d Sess., 168 (1976).

[7] The government argued on appeal that the District Court erred in not allowing the admissions to be withdrawn or amended, but stated at oral argument that the admissions did not harm its case.

of emotional distress. The Court found that there was no disputed issue of material fact and ruled that the four elements necessary to prove intentional infliction of emotional distress were proven for Anne M. Hart. After trial, the Court ruled that the government was liable to petitioners, Gillian Elaine Hart and Vera Lee Hart, as well.

The elements required to be proven in order to maintain an action for intentional infliction of emotional distress under Florida law are: (1) deliberate or reckless infliction of mental suffering; (2) outrageous conduct; (3) the conduct must have caused the distress; and (4) the distress must be severe.

The memorandum decision of the District Court in support of it's grant of partial summary judgment asserted that the government's brief in opposition to petitioners' motion for summary judgment confined itself to the single element of seriousness.[8] There was no dispute as to the causation and seriousness of Mrs. Hart's emotional distress. The District Court found that outrageousness was proven as a matter of law. See p. 17a, *infra*.

The District Court, after trial, awarded damages to the three plaintiffs below and the government appealed.

On appeal to the Eleventh Circuit, the government argued that the discretionary function exception to the Federal Tort Claims Act barred plaintiffs' action for damages. The government additionally argued that the District Court erred on the merits in holding it liable for the intentional infliction of emotional distress in that its conduct was not "outrageous" and that it had not conceded that its employees had acted intentionally or recklessly. The Eleventh Circuit agreed. See p. 10a, *infra*.

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[8] The government, in its appeal, addressed the District Court's failure to discuss the first element of the tort-deliberate or reckless infliction.

The Eleventh Circuit found that all government efforts to identify, account for, and bury dead U.S. servicemen are based entirely upon policy judgments and thus immune from suit under the discretionary function exception to the Federal Tort Claims Act. The Court also found that the District Court's holding that the conduct complained of was intentional and outrageous was erroneous. The court, therefore, reversed the District Court's grant of summary judgment and remanded with instructions to enter judgment for the United States. See p. 12a, *infra*.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's holding, that all government efforts to identify, account for and bury dead U.S. servicemen are based entirely upon policy judgments, directly conflicts with decisions of this Court and other Circuits.

The Eleventh Circuit's ruling is in direct conflict with this Court's holdings in *United States v. A. S. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984), *Dalehite v. United States*, 346 U.S. 15 (1953), *Berkovitz v. United States*, 108 S.Ct. 1954 (1988), and *Indian Towing Company v. United States*, 350 U.S. 61 (1955). It is also in direct conflict with *Hendry v. United States*, 418 F.2d 774 (2nd Cir. 1969) and *Kohn v. United States*, 591 F.Supp. 568 (E.D.N.Y. 1984), Affirmed, 760 F.2d 253 (2nd Cir. 1985).

The Eleventh Circuit decision also directly conflicts with several of its own decisions, specifically, *Alabama Electric Co-op, Inc., v. United States*, 769 F.2d 1523 (11th Cir. 1985) and *Drake Towing Company, Inc. v. Meisner Marine Construction Co.*, 765 F.2d 1060 (11th Cir. 1985).

"It is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." *Varig Airlines*,

supra. A governmental act is discretionary and therefore shielded from liability if it is performed "at a planning rather than operational level and involve(s) considerations more or less important to the practicability of the Government's . . . program." *Dalehite,* supra. The government may be sued, however, for negligence in the non-discretionary execution of discretionary decision. *Payton v. United States,* 679 F.2d 475, 480 (5th Cir. Unit B 1982) (en banc); see *Indian Towing Company v. United States, supra.* The ultimate determination is the "nature and quality of the discretion involved in the act complained of." *Smith v. United States,* 375 F.2d 243, 246 (5th Cir.), *cert. denied,* 389 U.S. 841 (1967). For the government to show merely that some choice was involved in the decision making process is insufficient to activate the discretionary function exception. *J.H. Rutter Rex Manufacturing Co. v. United States,* 515 F.2d 97, 99 (5th Cir. 1975), *cert. denied,* 424 U.S. 954 (1976). The balancing of policy considerations is a necessary prerequisite. *Id.*

Under these principles, the initial decisions by the government to excavate the Pakse crash site, to seek the recovery of remains, and to forward the remains to the CILHI were within the government's discretionary authority. At that point, however, the operational level of the government owed a duty of reasonableness to the petitioners here in the non-discretionary execution of discretionary decisions.[9] The actions of the government in the issuance of a "positive identification," the persistence in that identification in the face of overwhelming evidence to the contrary, the issuance of ultimatums by the Secretary of the Air Force, and the summary refusal of

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[9] A "responsibility of the military to the missing servicemen and their next of kin," has been recognized and admitted by the government, imposing a duty of due care and reasonableness upon it. H.R. Rep. No. 94-1764, 94th Cong., 2d Sess., 168 (1976) ("H.R. Rep. 94-1764").

the government to return Lt. Col. Hart to the "unaccounted for list" were all accomplished at the operational level of government and are actionable.

In both *Varig Airlines* and *Dalehite*, *supra*, this Court held that the implementation of government policies or programs may be shielded from tort liability if the aspects of its performance alleged to be negligent are dictated by guidelines adopted at the policy-making level.

The government has failed to produce any evidence regarding guidelines adopted at the policy-making level which would shield its conduct from liability. In fact, to the contrary, relevant military regulations specifically prohibit the actions taken by CILHI and the Secretary of the Air Force. The government may not simply "apportion commingled masses of remains into the known number of individuals involved in a common incident, for release to the next of kin as individually identified remains." [10] The Secretary of the Air Force may not direct the burial of a service member when the next of kin can be located and has not stated in writing that she is unconcerned with the disposition of the remains.[11]

The government's removal of Lt. Col. Hart from the unaccounted for list is also contrary to its own policy position as stated in a memorandum from the office of the Assistant Secretary of Defense.

The Eleventh Circuit's decision offhandedly dismissed petitioners' contention that violation of relevant military regulations brings this case squarely out of the protection afforded under the discretionary function exception. This directly conflicts with *Berkovitz*, *supra*, which held that "the discretionary function exception will not apply when a federal statute, regulation, or policy specifically pre-

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[10] Army Field Manual 10-286, Section 1-6(a)(2) and Air Force Regulations 143-1, Sections 8-10(a).

[11] Air Force Regulation 143-1 (C1).

scribes a course of action for an employee to follow." *Id.*, at p. 1958. Incredibly, the government's attorney admitted at oral argument before the Eleventh Circuit that the effect of the admissions of record, including the admission it randomly sorted bone remnants, if allowed to stand, removed this case from the discretionary function exception.[12]

The District Court's denial of the government motion to dismiss is firmly grounded not only in *Varig Airlines*, and *Dalehite*, *supra*, but also in *Indian Towing Company v. United States*, *supra*, and in the Eleventh Circuit's own decisions in *Drake Towing Company, Inc. v. Meisner Marine Construction Co.*, 765 F.2d 1060 (11th Cir. 1985), and *Alabama Electric Co-operative, Inc. v. United States*, 769 F.2d 1523 (11th Cir. 1985). All three cases involved initial decisions made at the planning level, decisions involving questions of policy and the evaluation of factors such as the financial, political, economic, and social effects of a given plan or policy. However, all three cases also recognized that execution of those decisions in the absence of policy directives to the contrary, must be accomplished reasonably and with due care.

The District Court's ruling recognized this line of demarcation between the planning and operational levels of government. The government's actions in "identifying" the remains and its treatment of the family is "on all fours" with *Kohn v. United States*, *supra*. As in *Kohn*, the government's actions in the handling of the remains and the treatment of Lt. Col. Hart's family "did not involve the government's regulations of conduct or private policy judgments to advance important governmental purposes. There is thus no basis for considering those actions discretionary." *Id.*, at 571.

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[12] The Eleventh Circuit did not disturb the District Court's ruling that the matters sought were deemed admitted. It simply stated in dicta, contradicted by the admission of record, that the government did not "foist" a mistake on the Harts. See p. 18a, *infra*.

The Eleventh Circuit's decision is also at odds with *Hendry v. United States, supra*, where the Second Circuit held:

> "The fact that judgments of government officials occur in areas requiring professional expert evaluation does not necessarily remove those judgments from the examination of the Court by classifying them as discretionary functions under the Act. To the extent that the medical profession establishes no set rules to accommodate the handling of a particular medical case, the individual doctor's judgment in that case should be measured by the standards of due care." 418 F.2d at 783.

Any concern that this case will open the "floodgates" of litigation is misdirected. Largely as a result of this suit, the government is now issuing valid identifications, soundly based on recognized scientific methodology. The families are now given the opportunity to have an expert second opinion prior to the government issuing an identification and changing records. The Pakse identifications were an aberration. With the exception of this case, scientific evidence has always been required. The government, however, now wants the courts to sanction the aberration.

The Eleventh Circuit has created a confusing and dangerous precedent, likely to generate even further confusion among the other Circuits. It is a precedent directly at odds with the prior decisions of this Court. Plenary consideration of the matter by this Court is essential.

II. The decision below on the merits is directly at odds with Florida Law and the undisputed facts of this case.

Even before the Florida Supreme Court recognized the tort of intentional infliction of emotional distress in *Metropolitan Life Insurance Co. v. McCarson*, 467 So.2d 277 (Fla. 1985), the courts in the State of Florida had historically and consistently awarded damages for the tortious interference with rights involving dead bodies. In

Kirksey v. Jernigan, 45 S.2d 188 (Fla. 1950), the Florida Supreme Court set out the test which even today stands as the basis of any recovery: "Where the wrongful act is such as to reasonably imply malice, or where, from the entire want of care or of attention to duty, or great indifference to the persons, property, or rights of others, such malice will be imputed as would justify the assessment of exemplary or punitive damages." Malice, or stated in other words—deliberate or reckless disregard of the rights of others—will be imputed to the actor upon a finding of outrageousness.

The District Court correctly found the actions of the government in this case were outrageous as a matter of law. Even though a grant of summary judgment is subject to *de novo* review,[13] in a case such as this one involving a district court's interpretation of the law of the state where it sits, the appellate court must give deference to that interpretation.[14] The Eleventh Circuit's assertion that "CILHI took months to make its identifications and attempted to use what scientific methods it could to make sense of the sparse remains" [15] flies in the face of the government admissions of record. The government admitted science played no part in the identification. It admitted that the co-mingled masses of unidentified remains were simply apportioned into the known number of individuals involved in a common accident for release to the next of kin as individually identified remains.

The Eleventh Circuit's assertions, that "(a)lthough Secretary Orr did send Mrs. Hart a letter telling her that if the remains were not claimed they would be buried, the Secretary promptly postponed the proposed interment

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[13] *Carlin Communication, Inc. v. Southern Bell Tel. & Tel. Co.*, 802 F.2d 1352 (11th Cir. 1986).

[14] *Alabama Electric Cooperative, Inc. v. First National Bank of Akron*, 684 F.2d 789 (11th Cir. 1982).

[15] See p. 17a, *infra*.

at Mrs. Hart's request,"[16] also ignores the undisputed acts of this case. The office of the Secretary of the Air Force sent not one, but two, letters concerning the impending burial of "her husband" to Mrs. Hart. The Court also ignores the prior assurances to Mrs. Hart and the California District Court by the Air Force that the remains would be held as unclaimed in a mortuary storage facility. The Court additionally missed the point that the Secretary had no right to direct the burial under relevant Air Force Regulations.

It is obvious that the Eleventh Circuit's reversal on the merits is premised upon its finding that the acts complained of were protected under the discretionary function exception to the Federal Tort Claims Act. Once this Court finds the conduct is not so protected, it is clear that Florida law and the undisputed facts here would permit a grant of summary judgment. The lower courts need guidance from this Court.

CONCLUSION

For these various reasons, this petition for certiorari should be granted. If petitioners are correct in urging that the Eleventh Circuit erred in failing to note that the acts complained of were committed in the non-discretionary execution of discretionary decisions, in addition to being "outrageous" and committed in reckless disregard of petitioners' rights, the District Court's judgment should be affirmed.

Respectfully submitted,

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[16] See p. 17a, *infra*.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 89-3193

ANNE M. HART, individually and as natural guardian for GILLIAN ELAINE HART, and VERA LEE HART,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

March 1, 1990

Michael P. Finney, Asst. U.S. Atty., Pensacola, Fla., Robert S. Greenspan, U.S. Dept of Justice, Civil Div., Appellate Staff, Thomas M. Bondy, Major James M. Kinsella, U.S. Air Force, General Litigation Div., Office of the Judge Advocate Gen., Lt. Col. Wm. C. Kirk and Major James N. Hatten, Judge Advocate Gen., Dept. of the Army, Washington, D.C., for defendant-appellant.

Robert L. Crongeyer, Fran L. Frick, Pensacola, Fla., for plaintiffs-appellees.

Before JOHNSON, HATCHETT and ANDERSON, Circuit Judges.

JOHNSON, Circuit Judge:

The United States appeals the district court's grant of summary judgment in favor of appellee Anne Hart, 681 F.Supp. 1518, and the court's decision after a bench trial in favor of Vera Hart and Gillian Hart under the Federal Tort Claims Act, 28 U.S.C.A. §§ 1346(b), 2671-2680.

I. STATEMENT OF THE CASE

A. *Facts*

On December 21, 1972, during the Vietnam War, a United States Air Force AC-1304 Spectre was hit by anti-aircraft fire and crashed near Pakse, Laos. Sixteen crewmen were aboard, including Lt. Col. Thomas Trammell Hart, III, a 32-year-old Table Navigator. Of the sixteen crew members, two parachuted to safety and were rescued. Friendly Loatian forces found the arm and hand of one crew member at the crash site; these remains were identified as belonging to Capt. Joel Birch. A captured Pathet Lao soldier claimed also to have found a pile of bloody bandages, five deployed parachutes, and the remains of five or six individuals which were subsequently buried in a common grave. Capt. Birch was declared killed in action ("KIA") and the thirteen missing crewmen were listed as missing in action ("MIA").

About five months after the Pakse crash, an American reconnaissance aircraft flying over an area of Northern Laos approximately three hundred miles from the Pakse site photographed what appeared to be a large area of tall grass that had been stomped down to read "1573 TH" or "1973 TH." Military intelligence indicated that the military believed the symbol referred to Lt. Col. Hart. This photograph, along with the testimony about the bloody bandages and deployed parachutes, was classified.

In 1978, President Carter lifted the injunction against status reviews of military personnel missing in Southeast Asia. The Air Force convened a status review board to review the status of the thirteen crewmen. The crewmen's families were informed that no classified material would be made available to them or considered in determining whether to change the crewmen's status. Thus, the existence of the photograph and the bandages and parachutes was not revealed.[1] The review board conducted a hearing and concluded that Lt. Col. Hart was dead. Mrs. Hart testified before the board that she concurred with this finding. Lt. Col Hart's status, along with that of the twelve other missing crewmen, was thus changed from MIA to KIA.

In September 1982 members of the National League of Families, including Anne Hart, visited the crash site. The group recovered several bits of airplane skin, a metal flight boot insert, and two bone fragments, which Mrs. Hart turned over to the Government. The fragments were transmitted to the U.S. Army Central Indentification Laboratory in Hawaii ("CILHI"). In February 1985, a CILHI team excavated the Pakse crash site and recovered thousands of bone and tooth fragments, personal effects, and I.D. tags.[2] This material was transmitted to the CILHI laboratory. After approximately four months of study, CILHI recommended to the Armed Services Graves Registration Office ("ASGRO") that the thirteen crewmen be listed as identified. CILHI stated that it had found very small numbers of bone fragments corresponding to each airman; these pieces, along with their location at the crash site and various personal effects, led to CILHI's conclusion. ASGRO accepted CILHI's recommendation, and Mrs. Hart was notified on July 1, 1985 that her husband had been identified.

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[1] Mrs. Hart later obtained this information from other sources.

[2] No. I.D. tags, dental material, or personal effects belonging to Lt. Col. Hart were found.

Mrs. Hart was told at this time that the identification was the result of a process of elimination.

Mrs. Hart immediately requested that she be allowed to have an expert examine the remains at her expense and provide a second opinion.[3] This request was denied. Mrs. Hart subsequently contacted Dr. Michael Charney, a forensic anthropologist at Colorado State University, to determine whether he would be willing to provide the second opinion. After determining that Dr. Charney would be so willing, Mrs. Hart filed suit in the Northern District of California. She sought injunctive relief prohibiting the Government from forwarding the remains to the families before Dr. Charney examined them. The district court granted a temporary injunction. Dr. Charney examined the bones purported to belong to Lt. Col. Hart and concluded that it was impossible to tell whether those fragments came from Lt. Col. Hart or even from an individual at the crash site.

Based on Dr. Charney's disagreement with the CILHI conclusion, the case was dismissed with prejudice. Left unresolved was the question of what to do with the disputed remains; Mrs. Hart refused to accept them, making her the first family member to refuse to accept remains. Government counsel told the district judge that the remains would be held in mortuary storage. Based on his confidence in the Government identification, however, Secretary of the Air Force Verne Orr sent a letter to Mrs. Hart on October 9, 1985 stating that if she did not wish to accept the remains, they would be buried at Arlington National Cemetery with full military honors. December 2, 1985 was set as the interment date.

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[3] Mrs. Hart became concerned that the identification was arbitrary when she realized that there had been 13 positive identifications. She felt that CILHI did not consider that five individuals may have been buried in a common grave. She also felt that there should have been 14 identifications, because only Capt. Birch's arm and hand were found.

Meanwhile, the Army decided to commission an independent civilian inquiry into the CILHI identification. Drs. Ellis R. Kerley, William R. Maples, and Lowell Levine, forensic anthropologists and fellows of the American Academy of Forensic Scientists, were enlisted as the investigating team. Mrs. Hart heard of the investigation and requested that the burial of the remains be delayed. Secretary Orr complied with this request. From December 9 through December 12, 1985, the team conducted an on-site inspection of the CILHI laboratory. The team found that the administration of CILHI was excellent and that CILHI's personnel were dedicated, well-trained, and experienced.

The panel concluded, however, that it could confidently confirm only two of the Pakse identifications. The other identifications did not appear to be justified according to standard forensic methods and could not withstand scientific scrutiny. The team's report recommended some changes in CILHI procedure and personnel. Drs. Kerley and Maples saw the actual Pakse remains after the issuance of their report. After viewing the remains themselves, the two doctors affirmed their earlier findings that the remains did not provide sufficient information to make the kinds of identifications CILHI had made.

The Air Force contacted the families of the thirteen crew members and explained that, if they wished, the identifications of their loved ones would be reconsidered. Mrs. Hart and the family of Capt. George McDonald requested such reconsideration. On June 10, 1986, ASGRO rescinded the identifications of Lt. Col. Hart and Capt. George McDonald. The Government did not, however, return Lt. Col. Hart to unaccounted-for status.

B. *Proceedings Below*

On October 30, 1986, after exhausting their administrative remedies, Anne Hart, along with Lt. Col. Hart's mother, Vera Lee Hart, and Lt. Col. Hart's daughter,

Gillian Elaine Hart, filed suit in the Northern District of Florida. The Harts sued under the Federal Tort Claims Act ("FTCA") for the intentional infliction of emotional distress as defined by Florida law. The complaint alleged that the Army and Air Force knowingly made a false positive identification of Lt. Col. Hart's remains, that they persisted in this identification in spite of overwhelming evidence to the contrary, that they improperly issued an "ultimatum" about burial, and that they refused to return Lt. Col. Hart to unaccounted-for status after resciding his identification. The Harts also produced evidence which they claim proves Lt. Col. Hart may still be alive.

The Government filed a motion to dismiss on December 29, 1986. The Government argued, among other things, that the court had no jurisdiction under the FTCA's "discretionary function" exception, 28 U.S.C.A. § 2680 (a). The district court denied the motion on March 17, 1987. The Government filed a motion for reconsideration, which was denied on May 13, 1987. The Government also requested certification of the "discretionary function" question to this Court under 28 U.S.C.A. § 1292 (b); the district court denied this motion.

On May 26, 1987, the Government filed its answer. On October 21, 1987, the district court ruled pursuant to the Harts' motion that the Government had admitted all of the matters with respect to which the Harts had sought admission.[4] The Harts moved for partial summary judg-

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[4] Federal Rule of Civil Procedure 36(a) states that matters contained in a request for admission are deemed admitted unless they are answered in writing within 30 days after service of the request. The Harts appear to have filed their request for admissions on May 29, 1987; the Government responded on September 10, 1987. Because the response was submitted more than 30 days after service, the court was correct in deeming the matters admitted. The Government argues that the district court erred in not allowing the admission to be withdrawn or amended under Rule 36(b), which states that the court may allow such action upon motion if presentation

ment on September 21, 1987. On January 12, 1988, the court granted the motion, finding the Government liable to Anne Hart under Florida law for intentional infliction of emotional distress. After a bench trial on October 6, 1988, the district court found the Government liable to Vera and Gillian Hart as well.[5] On October 20, 1988, the court awarded the plaintiffs a total of $632,814.62: $382,814.62 for Anne Hart and $125,000.00 each for Vera and Gillian Hart.

II. ISSUES

The Government appeals to this Court, claiming that the district court erred in denying the Government's motion to dismiss based on the FTCA's "discretionary function" exception. We also consider whether the district court erred in granting Anne Hart's motion for summary judgment and in holding the Government liable for the intentional infliction of emotional distress.

III. ANALYSIS

A. *Discretionary Function*

1. *Definition*

The question of whether the district court had jurisdiction to consider the Government's actions in this case under the discretionary function exception is a question

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of the merits would be subserved thereby and if the requesting party fails to prove prejudice. Because the Government states on appeal that the admissions do not harm its case, however, we do not disturb this ruling.

[5] The court dealt separately with the parties due to some confusion in the pleadings. At the time of the initial filing, all of the children were apparently below the age of majority. Mrs. Hart thus submitted evidence only as to her own suffering. After granting her motion for summary judgment, the district court discovered that Lt. Col. Hart's mother and daughter (who had since reached majority) also sought damages. Because no evidence had been submitted as to their suffering, the district court held a bench trial on these issues.

of law, subject to *de novo* review by this Court. *Baker v. United States*, 817 F.2d 560, 562 (9th Cir.1987), *cert. denied*, 487 U.S. 1204, 108 S.Ct. 2845, 101 L.Ed.2d 882 (1988). The FTCA provides that federal courts have jurisdiction to entertain tort suits against the federal government, unless such suits involve:

> (a) Any claim based upon an act or omission of an employee of the Government . . . or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C.A. § 2680(a). *See United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 809, 104 S.Ct. 2755, 2762, 81 L.Ed.2d 660 (1984). The discretionary function exception expresses a congressional intent to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Id.* at 814, 104 S.Ct. at 2765.

The Supreme Court has isolated several factors in analyzing the exception. First, it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies. . . ." *Varig*, 467 U.S. at 813, 104 S.Ct. at 2764. Thus a court must ask whether the challenged acts, whatever the rank of the actor, "are of the nature and quality that Congress intended to shield from tort liability." *Id.* This involves determining whether the action was "a matter of choice for the employee." *Berkovitz by Berkovitz v. United States*, 486 U.S. 531, 108 S.Ct. 1954, 1958, 100 L.Ed.2d 531 (1988). For this reason, the exception does not apply if a federal statute, policy, or regulation specifically mandated the action. *Id.* at 1958, 1959.

Second, the Court has defined discretionary decisions as those in which there is room for policy judgment. *United States Fire Ins. Co. v. United States*, 806 F.2d 1529, 1535 (11th Cir.1986) (quoting *United States v. Varig Airlines*, 467 U.S. at 811, 104 S.Ct. at 2763). The discretion referred to is "the discretion of the executive or the administrator to act according to one's judgment of the best course. . . ." *Dalehite v. United States*, 346 U.S. 15, 34, 73 S.Ct. 956, 967, 97 L.Ed. 1427 (1953); *see also Ostera v. United States*, 769 F.2d 716, 718 (11th Cir. 1985); *United States Fire Ins. Co.*, 806 F.2d at 1535. For example, "[a] Governmental act is discretionary and therefore shielded from liability if it is performed at a planning rather than operational level." *Drake Towing Co., Inc. v. Meisner Marine Constr. Co.*, 765 F.2d 1060, 1064 (11th Cir.1985) (quoting *Dalehite*, 346 U.S. at 42, 73 S.Ct. at 971).

2. *Decisions Regarding Lt. Col. Hart*

a. *U.S. Efforts to Identify Dead Servicemen*

The United States argues that all government efforts to identify and bury dead United States servicemen are based entirely upon policy judgments, so that any act taken in connection with that effort should fall under the exception. The Government maintains that its actions in this case reflect a longstanding policy of attempting to search for, recover, and identify dead American servicemen. This policy was developed for two reasons. First, the United States military maintains that everyone who dies in service to the United States deserves a burial with full military honors. Second, POW/MIA families during the Vietnam era expressed a desire for the Government to attempt to identify individual remains if possible. Thus, the Government argues that the identification procedures used in this case were not merely scientific and forensic, but also were based on issues of public policy.

The Harts respond that methods used by CILHI to identify the remains in this case did not comport with ordinary forensic standards. They argue that the Army's forensic examiners, like doctors, should be judged by the standards of due care applicable to the forensics profession if that profession provides no set rules for a particular case. *See Hendry v. United States*, 418 F.2d 774, 783 (2nd Cir.1969) ("To the extent that the medical profession establishes no set rules to accommodate the handling of a particular medical case, the individual doctor's judgment in that case should be measured by the standards of due care.").[6]

We are persuaded by the Government's argument. Government efforts to identify deceased personnel are clearly discretionary functions. Further, ordinary forensic standards are inappropriate in cases such as the Pakse crash, when the remains of a number of persons are commingled, severely burned, and shattered. In such cases, military forensics examiners draw conclusions not only from the remains themselves, but from the fact that the remains were recovered at the crash site, that personal effects were found among the remains, that the remains showed the effects of high temperatuures associated with fires and explosions, and that the deceased personnel were listed as crew members on the plane's manifest. The technique is similar to a process of elimination; remains are

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[6] The Harts also argue that the Government's actions in this case were not discretionary under *Kohn v. United States*, 591 F.Supp. 568 (E.D.N.Y.1984), *aff'd*, 760 F.2d 253 (2nd Cir.1985). Kohn was shot in the head by a fellow officer. His family sued under the FTCA, claiming that Kohn's organs were cremated and his body was embalmed without their knowledge and contrary to their religious beliefs, and that they were misled regarding the circumstances of his death. *Kohn*, while similar in some ways to the present case, is not applicable. The government in *Kohn* did not argue the discretionary function exception. *Id.* at 571. Further, the Army's actions in *Kohn* appear to have violated a specific Army policy. *Id.* at 573-74. Finally, Kohn did not involve decisions made by coroners in the context of intermingled remains.

likely to belong to one person if they are not likely to belong to anyone else. The Army examiners also use anthropological approximations, inferring characteristics such as height and age from the bone fragments.[7] These inferred characteristics are compared with the known characteristics of the missing crewmen.

The discretionary nature of these processes is particularly evident with regard to the identification techniques used by CILHI. CILHI specializes in identification of remains from mass military disasters, such as the Iraqi bombing of the *U.S.S. Stark*, the terrorist bombing of the Marine barracks in Lebanon, and the plane crash in Gander, Newfoundland. The forensic procedures discussed above are often used in such situations. The decision to use these methods is an exercise of discretion dependent on the circumstances; it is up to the discretion of the individual forensics examiner to determine how much to rely on these techniques.[8]

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[7] Mrs. Hart claims that the anthropological records in this case were falsified, but offers no evidence in support of this claim.

[8] The Harts argue that CILHI's actions directly contradicted the provisions in the Army Field Manual for Identification of Deceased Personnel. As discussed earlier, the discretionary function exception does not apply if a government policy or regulation specifically prescribes a course of action. *Berkovitz*, 108 S.Ct. at 1958. Similarly, an employee's improper implementation of a policy or discretionary decision does not fall under the exception. *See United States Fire Ins. Co.*, 806 F.2d at 1537 (Coast Guard's decision to use method of "last resort" on operational decision not exempted from the FTCA); *Drake Towing*, 765 F.2d at 1065 (Coast Guard decision to establish navigational aids without determining safety characteristics of water not exempted from FTCA). If the Field Manual did indeed prescribe or proscribe specific methods for identifying remains in a Hart-type situation, CILHI's actions would not fall within the discretionary function exception. This argument is inapplicable, however, for two reasons. First, it does not appear that the Harts raised this contention below; in such a case, the claim is waived. *See Lattimore v. Oman Construction*, 868 F.2d 437, 439 (11th Cir.1989). Second, none of the sections cited by Mrs.

For the reasons discussed above, we find that the United States' efforts to identify the thirteen servicemen were discretionary functions, and that the court below had no subject matter jurisdiction to consider a challenge to those functions. In reaching this conclusion, we do not leave family members without remedy. Family members may challenge mistakes through military channels such as the Armed Forces Board of the Military or ASGRO. We simply decide that the identification procedures involved were administrative decisions grounded in social policy, which should not be second-guessed by the courts. Like nonjusticiable political questions, these procedures required decisions which "lack . . . judicially discoverable and manageable standards for resolving [them]" and were "impossib[le] [to decide] without an intial policy determination of a kind clearly for nonjudicial discretion." *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962).

b. *Lt. Col. Hart's Unaccounted-for Status*

As discussed *supra*, the discretionary function exception does not apply if a government policy specifically prescribes an action and that policy is violated. *Berkovitz*, 108 S.Ct. at 1958; *United States Fire Ins. Co.*, 806 F.2d at 1537. The Harts point to a POW/MIA interagency memorandum which states that it was the practice of the Government to remove names from the unaccounted for list as their remains were identified. The Harts argue that this practice establishes a specific federal policy, and that because Lt. Col. Hart's remains have not been positively identified, the Government's failure to return his name to the unaccounted-for list violates that policy. Thus, they argue that the discretionary function exception cannot apply. *See Berkovitz*, 108 S.Ct. 1958-59.

Hart provides specific guidelines for what actions should be taken and how. At best, they state that all procedures should be carefully carried out and recorded.

The Harts, however, produce no evidence other than their own assertions that this practice is a federal policy. In fact, the Government's policy seems to be embodied in its "Policy Position" statement, which states:

> Clearly, in cases where the total evidence indicates that the persons involved in the incident were in fact killed and where recovery efforts were thorough and complete, we must conclude that the individuals have been accounted for.

The Harts also claim that this policy was violated. This argument fails for two reasons. First, it is not clear that the above-quoted statements constitute a federal policy for the purposes of the discretionary function exception. The exception does not protect required functions, thus it does not protect functions which are mandated by statute, regulation, or policy. The act of deeming an individual "accounted for" if recovery efforts were thorough is not mandated. It depends upon the circumstances and the recovery efforts.

Second, the total evidence in this case indicates that the persons aboard the aircraft were killed. The plane took anti-aircraft fire in its forward fuel tank, resulting in a large mid-air explosion. The two men who parachuted to safety were located at the rear of the plane, away from the fuselage; Lt. Col. Hart was in the front of the plane. The two rescued men did not see anyone else survive. Remains were found scattered about the crash site.[9]

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[9] The Harts argue that the aerial photograph and the enemy soldier's testimony of bloody bandages and parachutes prove that Lt. Col. Hart is still alive. They also point to an affidavit by former Congressman William Hendon of North Carolina, in which he concludes that Hart is still alive. The House Select Committee on Missing Persons in Southeast Asia, H.R.Rep. No. 94-1764, 94th Cong., 2d Sess. (1976), investigated the Pakse crash. The Committee found that it was unclear whether the parachutes were flare chutes, personnel chutes, or drogue chutes, and that the parachutes might have been deployed by the force of the crash. The Com-

There is no evidence indicating that the search was not thorough. The CILHI team divided the crash site into sectors and dug down as deep as 14 feet in some areas They recovered some 50,000 bone fragments, ID. tags, and personal effects.[10] Even if the statement discussed above did constitute federal policy, the decision to label Lt. Col. Hart "accounted for" did not violate that policy.

Mrs. Hart expresses concern that the decision to label her husband "accounted for" may encourage his captors to kill him in the event that he is alive and held hostage, or may doom Lt. Col. Hart to live out his life in a prison camp.[11] The Government, however, must make a practical

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mittee found that the bloody bandages were found 10 kilometers from the crash site, in an area where both Royal and Pathet Lao forces were active. Based upon this and other information, the Committee concluded that the evidence overwhelmingly pointed to the death of all the crew members. Similarly, the Defense Intelligence Agency determined that the symbols in the aerial photograph were more likely attributable to victims of a crash occurring only five miles from the site of the photo.

Further, most of the evidence pointed to by the Harts is military intelligence information. The Supreme Court has recognized that judges have "little or no background in the delicate business of intelligence gathering." *CIA v. Sims*, 471 U.S. 159, 176, 105 S.Ct. 1881, 1891, 85 L.Ed.2d 173 (1985). Similarly, the Fourth Circuit has noted that courts are "inexpert and unfamiliar" with intelligence reports. *Smith v. Reagan*, 844 F.2d 195, 200 (4th Cir.), *cert. denied*, —— U.S. ——, 109 S.Ct. 390, 102 L.Ed.2d 379 (1988). Because the decision as to how much weight to give this evidence is discretionary, the decision whether to credit this evidence, and to what degree, falls under the discretionary function exception.

[10] The Harts argue that the recovery efforts at the crash site were not thorough and complete. They point to the district court's conclusion that the recovery efforts were not thorough because the CILHI party never found the common grave described by the captured Pathet Lao soldier. Again, the decision regarding the credibility of the enemy soldier is purely discretionary. There is no guideline or standard defining appropriately thorough search procedures.

[11] The Government explains in its reply brief that information regarding deceased personnel is kept on file even after such per-

decision at some point regarding when to discontinue the search for personnel. Such a decision must be discretionary in order for the Government to practically pursue such searches. Concerns such as Mrs. Hart's "frequently raise questions which are political and nonjusticiable in nature." *Alabama Elec. Co-op, Inc. v. United States*, 769 F.2d 1523, 1530 (11th Cir.1985) (quoting *Hendry*, 418 F.2d at 7831). This is just such a question.

c. *Secretary Orr's Letter*

Finally, Mrs. Hart argues that Secretary Orr's letter telling her that if she did not claim the remains they would be buried is actionable. This is a prime example of the discretionary function. Because this was the first time a family member had refused to accept "identified" remains, there was no policy or procedure explaining what to do with the remains. Secretary Orr had to rely on his own discretion. Based upon his confidence in CILHI's track record and his belief that the remains had to be properly interred, he wrote the letter. Although there may have bene other reasonable options available to Secretary Orr, he had the discretion to choose among those options.

B. *The Merits*

Although we find that the district court had no jurisdiction to hear the Harts' suit, we also note that the district court erred on the merits. To prove intentional infliction of emotional distress under Florida law, the plaintiff must prove: (1) deliberate or reckless infliction of mental suffering; (2) by outrageous conduct; (3) which conduct must have caused the suffering; and (4)

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sonnel are proclaimed "accounted for"; "accounted for" and "identified" are not equal in Army terminology. In fact, it was reported that Hart was captured alive in 1988, and a sighting of a "Tommy Hart" was reported in Laos in the same year; the Government has been investigating this information.

the suffering must have been severe. *Metropolitan Life Ins. Co. v. McCarson*, 467 So.2d 277, 278 (Fla.1985) (adopting definition laid out in Restatement (Second) of Torts § 46); *Dominguez v. Equitable Life Assur. Soc. of the United States*, 438 So.2d 58, 59 (Fla.App.1983). To grant summary judgment on such a claim, the district court must find that there is no genuine issue of material fact regarding the claim. Fed.R.Civ.P. 56. This Court's review of the district court's grant of summary judgment is *de novo*. *Shipes v. Hanover Ins. Co.*, 884 F.2d 1357, 1359 (11th Cir.1989). Regardless of whether the Government's conduct caused severe suffering, we cannot find that the conduct complained of was intentional or outrageous.

Conduct is intentional "[w]here the actor knows that [severe] distress is certain, or substantially certain to result from his conduct." *Ford Motor Credit Co. v. Sheehan*, 373 So.2d 956, 958 (Fla.App.), *cert. dismissed*, 379 So.2d 204 (Fla.1979). We have seen absolutely no evidence that the Government's acts in identifying, classifying, or attempting to bury the remains in question were committed with the knowledge that they would cause severe distress.[12]

Outrageous conduct is conduct which "is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *McCarson*, 467 So.2d at 278-79 (quoting Restatement (Second) of Torts § 46 Comment (d) (1965)). The district court found that ASGRO's reliance on CILHI's identification was reasonable. The court found, however, that Secretary Orr issued an "ultimatum" to Mrs. Hart regarding burial without addressing the Government's statement that the remains would be stored. It also found that the Government took Lt. Col. Hart off the unac-

[12] The district court did not discuss this element of the tort.

counted-for list without considering the evidence of the common grave, the bloody bandages, the five parachutes, and the aerial photograph. The court concluded:

> although, respecting some of the disparate acts of the government in this case a reasonable jury might find a particular act was not outrageous, taken as a whole outrageousness is provided; an average member of society, upon recitation of these facts would exclaim, "outrageous." Outrageousness is proved herein as a matter of law.

The district court's conclusion is difficult to understand. CILHI took months to make its identifications and attemped to use what scientific methods it could to make sense of the sparse remains. The identification of Lt. Col. Hart's remains was made after considering CILHI's report and Mrs. Hart's testimony. It is not clear that the Government failed to consider the classified evidence in its identification decision. Instead, the Government decided that the classified information was not probative of its decision. Although Secretary Orr did send Mrs. Hart a letter telling her that if the remains were not claimed they would be buried, the Secretary promptly postponed the proposed interment at Mrs. Hart's request. The Government also rescinded the identification at Mrs. Hart's request. CILHI has subsequently implemented the majority of the changes suggested by the Army review panel. Mrs. Hart herself has testified that throughout the proceedings she was treated in a very pleasant manner.

The Harts point to two Florida cases and one New York case which they claim parallel this case in outrageousness. In *Kirksey v. Jernigan*, 45 So.2d 188 (Fla. 1950), an undertaker took a five-year-old child's body and embalmed it without parental consent. The undertaker refused to return the body to the mother and, in fact, charged the mother twice the usual amount for embalming. In *Sherer v. Rubin Memorial Chapel, Ltd.*, 452

So.2d 574 (Fla.App.1984), a funeral home dressed the wrong cadaver and then tried to convince the family that the cadaver was their loved one. After the family prevailed, the funeral home would not dress the cadaver, but simply threw clothes over it. Finally, in *Kohn v. United States*, 591 F.Supp. 568 (E.D.N.Y.1984), *aff'd*, 760 F.2d 253 (2nd Cir.1985), the Army embalmed a soldier and cremated some internal organs without the family's consent. The family was orthodox Jewish, and such actions violated their faith. The Army also misled the family regarding the circumstances of the soldier's death.

These cases are starkly distinguishable from the Hart case. In each of the above cases, the defendants made mistakes which they deliberately tried to hide from the families. In this case, the Government has not intentionally foisted a mistake upon the Harts. It made its identification as best it could, and when that proved to be insufficient, it complied with every request made by the Harts except their request that Lt. Col. Hart be returned to accounted-for status. As explained above, that decision lies within the "policy judgment" discretion of the Army.

IV. CONCLUSION

For the foregoing reasons, we REVERSE the district court's grant of summary judgment and REMAND with instructions to enter judgment for the United States.

APPENDIX B

UNITED STATES DISTRICT COURT
N.D. FLORIDA

No. PCA 86-04370 WEA

ANNE M. HART, individually, etc., *et al.*,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

Jan. 12, 1988

Robert L. Crongeyer, Beggs & Lane, Fran L. Frick, Pensacola, Fla., for plaintiffs.

Michael P. Finney, Asst. U.S. Atty., Pensacola, Fla., Joan M. Bernott, Sp. Litigation Counsel, U.S. Dept. of Justice, Lt. Col. William C. Kirk, Major James N. Hatten, Office of the Judge Advocate General, Dept. of the Army, Major James M. Kinsella, USAF, General Litigation Div., Office of the Judge Advocate General, Washington, D.C., for defendant.

MEMORANDUM DECISION

ARNOW, Senior District Judge.

In this case plaintiffs have brought suit against the United States under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq., for intentional infliction of mental distress caused by the misidentification of remains as Lt. Col. Thomas Hart, persistence in that identification, and continued carrying of Lt. Col. Hart's name as "accounted

for" even after the Graves Registration Board rescinded the identification. Before the court is plaintiffs' motion for partial summary judgment on the issue of liability, defendant's cross motion for summary judgment, and plaintiffs' motion to strike defendant's cross motion for summary judgment. The case is one of first impression presenting a unique factual situation and a unique application of the Federal Tort Claims Act to those facts. A recitation of the facts will be helpful to a full understanding of this court's ruling.[1]

On December 21, 1972, during the Vietnam conflict, an American Air Force AC 130 was shot down by enemy fire in Laos. Sixteen American military personnel were aboard. Within two hours two survivors who had parachuted safely from the plane before it crashed were rescued. Early the following morning enemy soldiers went to the crash site. A captive enemy later reported that dismembered remains of five or six individuals were scattered about the crash site and that he never heard any reports of survivors.[2] Later that day an American team searched the crash site. No other survivors were found but part of an arm and hand were recovered. Fingerprint analysis later identified these body parts as being of Captain Birch, whose status was changed to killed in action. Thirteen other crew members were listed as missing in action, including Lt. Col. Thomas Trammell Hart, III.

In 1973 an American reconnaissance aircraft flying over Northern Laos photographed a large area of grass in the configuration of "1973TH" or "1573TH". The

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[1] In an earlier ruling the court struck the untimely responses to plaintiffs' request for admissions, so that every item of that request is deemed admitted pursuant to F.R.Civ.P. 36(a), and, therefore, conclusively established pursuant to F.R.Civ.P. 36(b).

[2] Those remains found were reportedly buried. (Defendant's Ex. D). There were also reports that some bloody bandages and 5 open parachutes were found at the site.

military intelligence analysis of this photo contained specific reference to Lt. Col. Hart, then Captain Hart.[3]

In 1978, a status review board convened and recommended the status of Lt. Col. Hart be changed from MIA to KIA.[4]

In September, 1982, members of the National League of Families visited the crash site. Mrs. Hart, a plaintiff here, was a member of that group. This group discovered two bone fragments which were turned over to the government and sent to the United States Army Central Identification Laboratory, Hawaiian Islands (CIL).[5]

In December, 1983, eight additional bone fragments were found by an advance team from the CIL. In February, 1985, a CIL team excavated the site and recovered approximately 50,000 bone and dental fragments along with personal effects and ID tags, all of which were transported to the Hawaii lab. (Complaint, paragraph 10, Answer, paragraph 10) Analysis of these was undertaken at the CIL and the CIL recommended identification of 13 individuals from these fragments.[6]

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[3] Plaintiffs' Request for Admissions, paragraph 1. In affidavit, Brigadier General James W. Shufelt stated that this photo was taken 5 months after the crash and 300 miles North of the crash site, and that it is more plausibly associated with an aircraft crash which occurred within 5 miles of the characters and 13 days before the photographs were taken. But he neither disputes nor mentions an intelligence analysis, which is admitted, linking this photo with Lt. Col. Hart. (Defendant's Ex. F).

[4] At this time the Review Board and Mrs. Hart were ignorant of the photograph and analysis referred to in footnote 3.

[5] These 2 fragments were later identified by CIL as belonging to Lt. Col. Hart along with 5 other fragments out of 50,000 found during a 1985 excavation of the crash site. (Complaint, paragraph 12, Answer, paragraph 12).

[6] No fragments were identified as belonging to Captain Birch although his ID tag was found. (Complaint, paragraph 13, Answer, paragraph 13). The majority of the fragments found, being deter-

Among those identified was Lt. Col. Hart. The CIL reported these findings to the Armed Services Graves Registration Board (ASGRO). The ASGRO accepted the identifications and the families were notified.

Mrs. Hart requested, and was refused, an independent forensic anthropologic examination of all 13 sets of remains. Thereafter she brought suit in the Central District of California for an injunction, but before hearing the Air Force allowed the independent examination of the remains identified as Lt. Col Hart. Dr. Michael Charney, PhD, conducted the examination and concluded that the 7 small bone fragments which had been identified by CIL as those of Lt. Col. Hart could not have been so identified.[7] The defendant admits that the remains identified as those of Lt.Col. Hart lacked the criteria necessary for identification pursuant to any recognized scientific procedure, and that the identification was based upon examination of the 7 bone fragments and the exclusion of other casualties involved in this crash. (Plaintiffs' Request for Admissions paragraphs 5 and 7)

Although Mrs. Hart's request for a permanent injunction was denied, the government asserted that, if the next of kin did not want to bury the remains, because of an independent examination throwing doubt upon the identification, the Air Force would accept return of the

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mined to be too small or too unexceptional to be helpful to the identification team were not used in the identification. (Declaration of Tadao Furue (document 58) at pg. 5). Identifications of all 13 of the unaccounted for cref members were reported made. (Complaint, paragraph 15, Answer, paragraph 15).

[7] "It is impossible to determine whether these fragments are from LTC HART or any other individual, whether they are from one individual or several, or whether they are even from any of the crew members of the AC-130A aircraft in question." (Declaration of Michael Charney, PhD, in *Hart v. Orr*, Civil No. C-85-4324 WHO, filed July 11, 1985). No dental identification was possible in the identification of Lt. Col. Hart, nor were ID tags or personal effects found which were associated with him. (Defendant's Ex. H, Attachment B at form DD 890 and form DD 891).

remains and they would just remain unclaimed remains kept in a mortuary. *Hart v. Orr*, No. C-85-4324 WHO (N.D.Cal.1985) (Transcript of Proceedings on July 18, 1985).[8]

In October of 1985, two events occurred. Ellis R. Kerley, PhD, was asked by the Army to conduct an evaluation of the procedures used at the CIL in identifying remains and the Air Force wrote Mrs. Hart, apparently without any regard for contrary assurances made to her in July, requiring that she arrange for disposal of the remains identified as her husband and advising that if she did not the Air Force would arrange burial of such remains as being those of her husband at Arlington National Cemetery.

In December of 1985 the inspection of the CIL was conducted. The inspection team was unable to make or confirm eleven of the thirteen proposed identifications with any scientific certainty. Dr. William Maples of the inspection team characterized CIL's failure to exercise proper standards of identification as "blatant". (Plaintiffs' Request for Admissions, paragraph 14). The CIL had "apportioned co-mingled masses of unidentified remains into the known number of individuals involved in a common accident for release to the next of kin as individually identified remains." [9]

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[8] "Yes, the plaintiff's attorney has requested what would happen—suppose it was sent to a laboratory somewhere; they disagreed with it, and the next of kin did not want to bury because they did not believe, for some reason, that it was the remains—the Government—the Air Force—is willing to consider that assuming that we can protect the integrity of the remains—that they would then accept a return of the remains from the next of kin; and the next of kin, essentially, just rejecting the remains—those remains. Then they would just be kept, I believe, probably, unclaimed remains, and just maintained in a—mortuary storage—or something . . .—as unclaimed." (Plaintiffs' Request for Admissions, paragraph #10).

[9] Plaintiffs' Request for Admissions, paragraph 13. This, in violation of Air Force Regulation 143-1(c)(3) dated December 28, 1983. (Defendant's Ex. V at pg. 9).

As a result of this investigation the Graves Registration Board rescinded the identification of Lt. Col. Hart, yet the departments of the Army and Air Force refused to place his name again on the unaccounted for list.[10]

Liability under the Federal Tort Claims Act is determined in accordance with state law. 28 U.S.C. § 1346 (b) Florida law is applicable here. Under Florida law for the plaintiff to prevail in this action the following four elements must be established: 1) deliberate or reckless infliction of mental suffering; 2) outrageous conduct; 3) the conduct must have cause the distress; and 4) the distress must be severe. *Metropolitan Life Insurance Co. v. McCarson*, 467 So.2d 277 (Fla.1985).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits on file . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. F.R.Civ.P. 56(c).

In the instant case, by affidavits of Dr. Jack Moser and Mrs. Hart, the mental distress of Mrs. Hart, its seriousness, and its cause, are proved. The government has presented no evidence to controvert the establishment of

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[10] The policy of the government is that, when identifications are rescinded and information exists which indicates that one or more individuals survived or may have survived, those individuals will be listed as unaccounted for but unidentified individuals will continue to be listed as accounted for, when the recovery efforts were thorough and complete. (Defendant's Ex. T). The thoroughness of the recovery effort here is not established. In fact, evidence exists which tends to prove the lack of thoroughness. A member of the Pathet Lao, who later surrendered, stated that he went to the crash site shortly after the crash and found 5 parachutes, two small piles of bloody bandages, and the remains of five or six people which were then buried in a common grave at the site. (Legal Review of Status Review Hearing attached to Defendant's Ex. D). During the excavation no evidence of any grave was found. (Defendant's Ex. G).

these elements, but has confined its opposition to plaintiffs' motion to the single issue of outrageousness.[11]

Adopting the Restatement (Second) of Torts § 46 (1965), the Florida Supreme Court held that:

> Liability has been found only where the conduct is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

467 So.2d at 279. (Citation omitted)

The question of whether or not the complained of behavior rises to the level of outrageousness necessary to constitute the tort is a matter of law, no fact. *Ponton v. Scarfone*, 468 So.2d 1009, 1011 (Fla. 2d DCA 1985). The test is whether the behavior is "so outrageous in character, so extreme in degree, as to go beyond all possible bounds of decency . . . atrocious, and utterly intolerable in a civilized community. *Id.* (quoting *Metropolitan Life Insurance Company v. McCarson*, 467 So.2d 277 (Fla. 1985)).

Regarding summary judgment, the Supreme Court has directed:

> The judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other, but whether a fair-minded jury could return a verdict for the [defendant] on the evidence presented. The mere existence of a scintille of evidence in support of the [defendant's] position will be in-

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[11] Indeed, defendant's cross motion for summary judgment is premised solely upon its assertion that defendant's actions were not outrageous.

> sufficient; there must be evidence on which the jury could reasonable find for the [defendant]. The judge's inquiry, therefore, unaviodably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict —"whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party conducting it, upon which the *onus* of proof is imposed."

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202, 214 (citation omitted).

The sentiment expressed by the Florida Supreme Court in *Kirksey v. Jernigan*, 45 So.2d 188 (1950), although the case is clearly distinguishable on its facts, is instructive. The court stated "the right to recover . . . is especially appropriate to [torts] . . . involving dead human bodies, where mental anguish to the surviving relatives is not only the natural and probable consequence of the character of wrong committed, but indeed is frequently the only injurious consequence to follow from it. *Id* at 189.

The government asserts that its actions in identifying the remains initially was reasonable, but no evidence of this reasonableness exists. In fact, in light of subsequent findings it was and is outrageous. The government then asserts that the adoption of that identification by the Graves Registration Board was reasonable. Under the evidence submitted it was reasonable. The GRB relied upon the CIL identification at that time and there is no evidence to indicate such reliance at that time was unreasonable. Next, the government asserts that the October, 1985, letter to Mrs. Hart containing the ultimatum that either she accept the remains and bury them or the government would do so was reasonable because the Secretary of the Air Force concluded there was a reasonable basis upon which to believe the identification was accurate. (Declaration of Vern Orr, Defendant's Ex. D).

Nowhere does Secretary Orr address the reasonableness of this action in light of the government's assurance of contrary action at the July, 1985, district court proceedings. Further, the government addresses the asserted outrageousness of maintaining Lt. Col. Hart on the accounted for list with the affidavit of Brigadier General James Shufelt of the Defense Intelligence Agency, who concludes there is no evidence to support the assertion that anyone other than the two survivors who were picked up at the scene survived. (Defendant's Ex. F) The affidavit ignored the information about a common grave, which was not found, the two piles of bloody bandages, and 5 parachutes, and dismissed assertions that the photographs of "1573TH" or 1973TH" were connected with Lt. Col. Hart without addressing why such a connection was ever made.

This court concludes that, although, respecting some of the disparate acts of the government in this case a reasonable jury might find a particular act was not outrageous, taken as a whole outrageousness is proved; an average member of society, upon recitation of these facts would exclaim, "outrageous." Outrageousness is proved herein as a matter of law. There being no disputed issue of material fact, the plaintiff Anne M. Hart, individually, is entitled to summary judgment on the issue of liability as a matter of law.

Insofar as the remainder of the plaintiffs are concerned, the record before this court is insufficient to establish for purposes of summary judgment the liability of the government to them. Insofar as the government's cross motion is concerned, it is insufficient to establish there was no liability on the part of the government to them.

An order in accordance with this memorandum decision will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

PCA 86-04370 WEA

ANNE M. HART, individually, etc., *et al.*,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

MEMORANDUM DECISION

[Filed Oct. 20, 1988]

In this case the court has, by prior summary judgment, determined that the defendant is liable to plaintiff Anne M. Hart (hereinafter Anne) for the severe emotional distress she has sustained by virtue of its actions so that there is now involved only the question of damages as far as she is concerned.

Insofar as plaintiffs Vera Lee Hart (hereinafter Vera) and Gillian Elaine Hart (hereinafter Gillian) are concerned, the matter is before the court on the question both of liability of the defendant to them and, if there is liability, the amount of damages.

The pertinent facts giving rise to this action are set forth in detail in the attached copies of pages 1 through 6 of this court's memorandum decision of January 12, 1988 (doc. 68), which are made a part hereof by reference.

ANNE M. HART

From the evidence before this court, prior to the misidentification of remains gathered at the crash site in Laos, Anne to a large extent had adjusted to the loss of her husband. Sharon Ezell, who has known her since 1981, testified Anne was an active, capable mother who was very attentive to her children and who was effectively managing a large household while participating in outside activities related to the MIA issue. She had also maintained her patriotic faith in the rectitude of the federal government.

Dr. Jack Mosher, a mental health counselor who first came to know Anne while he served as a guidance counselor at a parochial school her children were attending in the late 1970s, described her as an active, articulate and enthusiastic person who was intensely interested in her progeny's academic progress. Thomas Trammel Hart, IV, Anne's twenty five year old son, remembered his mother as a warm, caring, happy person who took good care of herself and the family prior to July 1985. His observation was confirmed by Heather Anne Hart, Anne's seventeen year old daughter and youngest child.

Subsequent to the event of the latter half of 1985 Anne's condition changed significantly. Her frustrating struggle with what she perceived to be an indifferent and unresponsive government undercut the foundations upon which her life had been built. As her feelings of powerlessness and alienation grew, she began to engage in emotional outbursts when dealing with the government's representatives. By February 1986 Anne knew she had serious emotional problems and began to see Dr. Jack Mosher for mental health counseling.

Under the evidence before this court she was no longer able to function or cope with the demands of daily life. She found herself unable to care for the children, keep the house clean or even pay the family's bills. Previously in-

volved and organized, she took no part in a daughter's wedding; it was all she could do to attend the ceremony. At the same time she stopped participating in National League of Families activities because she no longer possessed the drive and energy necessary to continue doing so. Instead, obsessed with the Vietnam war, she spent nearly all of her time at a local vet center. The children were neglected, her home was unkept, and her personal appearance became increasingly shoddy.

Sharon Ezell articulated specific changes in Anne's condition and behavior. She recalled getting phone calls from the children who complained there was no food in the house and decried their mother's refusal to speak to them. Overall, Sharon Ezell observed that Anne was simply unable to function, evincing signs of escalating emotional turmoil: smoking four or five packs of cigarettes a day; nervously twisting her hair into knots; letting her appearance deteriorate; refusing to eat; pacing the floor; and phoning at late hours because she was unable to sleep.

Thomas Trammell Hart, IV, testified that by February 1986 his mother was unable to shop, cook, or pay the bills, causing the utilities to be disconnected on several occasions even though sufficient funds were always available. He also observed that she has become shrewish and intolerant, discouraging visits by the childrens' friend which she had previously welcomed. Closeting herself in an upstairs bedroom with a television set and a coffeemaker, she paced the floor unable to sleep, leaving the house only to go to the local vet center where she served as a volunteer.

Dr. Jack Mosher, who first saw Anne professionally in February 1986, and was duly qualified as an expert witness, related similar observations. He explained that the active, joyful woman he had known in the late 1970s had become joyless, docile and alienated. Physically she showed symptoms of intense stress and emotional disturbance:

drastic weight loss; a pallid complexion; an unkept appearance; and constant smoking and coffee drinking. Dr. Mosher concluded that her condition demonstrated the debilitating consequences of severe emotional distress. In July 1986 he diagnosed her condition as situational depression, ultimately arriving at a treating diagnosis of depressive neurosis, an affiiction she continues to suffer from today.

Under Dr. Mosher's testimony 75% of Anne's depressive neurosis was attributable to the government's misconduct and 25% to other causes. His testimony also establishes Anne's depressive neurosis as a permanent condition with no prospect for recovery, and that the government's ongoing refusal to reclassify Lt. Col. Thomas Hart as unaccounted for continues to cause her great distress. In support of his professional opinion, Dr. Mosher described the results of a widely accepted personality inventory he administered in 1988. The test revealed severe depression, confusion and deep pessimism. Significantly it indicated that Mrs. Hart's ego strength was simply inadequate to permit recovery; she lacked the force of will to "bounce back". Dr. Mosher continues to see her in the hope that this assessment will ultimately prove overly pessimistic.

The government offered no evidence to refute or contradict the foregoing expert testimony and did not dispute his causal finding. Under the evidence presented this court can only conclude that Anne has suffered significant compensable injury as a consequence of the government's outrageous conduct.

To determine the appropriate measure of damages, this court has reviewed state court awards in similar cases. *Johnson v. U.S.*, 780 F.2d 902, 907 (11th Cir. 1986) (measure and components of damages for FTCA claims should be determined with reference to relevant state court decisions of the jurisdiction where the tort occurred). The Florida cases proved to be of relatively

limited value because this case is seemingly "one of first impression presenting a unique factual situation and a unique application of the FTCA to those facts." Memorandum Decision at 1-2 (doc. 68). Nevertheless, one Florida case involving analogous facts and an emotional distress claim provides a useful point of departure.

In *Smith v. Telophase National Cremation Society*, 471 So.2d 163 (Fla. 2d DCA 1985), the court held that an award of $250,000 in compensatory damages was not excessive, reversing the trial court's remittiture to $100,000. 471 So.2d at 166-167. *Smith* involved the mishandling and misidentification of the plaintiff's husband's ashes which were not disposed of in accordance with her explicit instructions, causing her to suffer extreme mental distress.

Several considerations distinguish *Smith* from the facts presented here.

First, Mrs. Smith know for a certainty that her husband was dead; her distress arose solely from the misidentification and improper handling of his ashes. Anne, however, was and remains uncertain of her husband's fate; she did not and does not know whether he is dead or alive. Such a situation is far more egregious than that presented in *Smith*, and logically more likely to produce a higher level of emotional distress and mental suffering.

Second, the misconduct in *Smith* constituted a discrete and completed incident, while the situation here remains unresolved. Anne has been subjected to a drawnout and ongoing emotional roller coaster. The government first positively identified certain remains as those of Lt.Col. Thomas Hart, refused his wife's request for a second opinion, then subsequently rescinded its identification. And yet it continues to classify him as accounted for despite the lack of any evidence upon which to base such a classification. Thus, unlike Mrs. Smith, Anne's quandary has not been resolved and continues to cause her severe emotional distress.

Finally, Anne, again apparently unlike Mrs. Smith, suffers from depressive neurosis with no prospect for recovery. She is afflicted with a serious, permanent condition that drastically impairs her ability to function and cope with everyday life. As far back as 1974 in *Metropolitan Dade County v. Dillon*, 305 So.2d 36 (Fla. 3d DCA 1974), the court upheld an award of $500,000 to compensate a young mother whose depressive neurosis was brought on by the tragic and wrongful death of her six year old daughter.

This court concludes that Anne's damages for severe emotional distress are $500,000. Accepting Dr. Mosher's uncontroverted testimony that 75% of her injuries are attributable to the government's misconduct, Anne shall recover $375,000.00. In addition, she shall be awarded $7,814.62, being the amount of stipulated economic damages. Total recovery shall be $382,814.62.

VERA LEE HART AND GILLIAN ELAINE HART

Liability unded the Federal Tort Claims Act is determined in accordance with state law. 28 U.S.C. § 1346(b). Florida law is applicable here. For plaintiffs Vera and Gillian to prevail under Florida law the following four elements must be established: 1) deliberate or reckless infliction of emotional suffering; 2) outrageous conduct; 3) the conduct must have caused the distress and 4) the distress must be severe. *Metropolitan Life Insurance Co. v. McCarson*, 467 So.2d 277 (Fla. 1985).

Adopting the Restatement (Second) of Torts § 46 (1965), the Florida Supreme Court held that:

> Liability has been found only where the conduct is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally the case is one in which the recitation of the facts to an average mem-

> ber of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

467 So.2d at 279.

The question whether the complained of behavior rises to the level of outrageousness necessary to constitute the tort is a matter of law, not fact. The test is whether the behavior is "so outrageous in character, so extreme in degree, as to go beyond all possible bounds of decency . . . atrocious, and utterly intolerable in a civilized community." *Ponton v. Scarfone*, 468 So.2d 1099, 1011 (Fla. 2d DCA 1985). In addition, the outrageous conduct must have caused distress that no reasonable person in a civilized society should be expected to endure. *Kraeer Funeral Homes, Inc. v. Noble*, 521 So.2d 324 (Fla. 4th DCA 1988).

After reviewing all the evidence this court concludes that defendant is liable for compensatory damages for the reckless infliction of emotional distress as to both Vera and Gillian.

VERA LEE HART

Vera is the mother of Lt.Col. Thomas Hart. He was her oldest child and only son. Throughout the events of the latter half of 1985 Vera was kept up to date on her son's case by representatives of the government. Anne testified the government did so pursuant to her request, which included her desire to be contacted first so she could prepare Vera for the news. After Lt.Col. Hart was reclassified such communications were discontinued, but Anne was still in constant touch with Vera and kept her well informed of developments as they occurred. Vera was fully aware of the government's conduct and participated fully in the family's often frustrated but tenacious efforts to rectify the situation.

The evidence presented established that Vera suffered mental distress which was factually and legally caused

by the government's handling of the matter. She managed to carry on after the initial shock when she was informed her son was missing in action. Indeed, she continued to work as a bookkeeper and officer manager for a local newspaper in Live Oak, Florida. She also went back to school in 1972 and subsequently obtained a real estate license. Vera had regained what she described as a semblance of stability and order in her life; she had adjusted to the apparent loss of her son.

Ann Carolyn Hart and Sharon Ratliffe described their mother as an active, caring person who was very involved in her church prior to July 1985. Ann Carolyn Hart observed significant changes in her mother following the misidentification and ensuing events. She explained that her mother was no longer interested in church or family activities, even losing interest in attending the annual family reunion at Thanksgiving which she had previously organized and managed. Vera was described as depressed and uninterested in anything besides her son's case. Both her daughters described her as withdrawn, spending most of her time sitting on the sofa sifting through the documentation on her son in an apparently aimless and repetitive manner. She left her position with the local newspaper and now only works part time in a clerical position described as below her capabilities. Anne testified that her mother-in-law is now unable to cope with life and, like herself, is obsessed with the status and fate of her only son.

GILLIAN ELAINE HART

Gillian is twenty two years old. She is the eldest daughter of Lt.Col. and Mrs. Thomas Hart. Her sister Heather Anne Hart, testified that prior to the events of the second half of 1985 Gillian was a normal, happy, athletic and independent individual. While in high school she ran cross country and played tennis and basketball. Prior to the erroneous positive identification of her father's remains Gillian had moved to Northern California to attend school and pursue an acting career.

Of all the children Gillian was the only one who had distinct memories of her father, whom she said she deeply loved. On July 2, 1985, Anne called to inform her that her father's remains had been positively identified. Gillian testified that she was surprised, saddened and angered. Mother and daughter discussed their desire for a second opinion to confirm or contradict the government's findings. Thereafter, they were in frequent contact regarding Lt.Col. Hart's case. According to Anne, they talked on the phone about it approximately three or four times a week. Gillian even made a trip to Washington from Berkeley, California to support her mother's efforts.

After her return from our nation's capital, Gillian began to feel increasingly empty and hurt. She testified that she began to overeat and then purge herself. As her depression grew she began to lose motivation and interest in her own affairs; ignoring audition calls and dropping her classes at a local junior college.

When she returned to Pensacola to visit at Christmas in 1985 her family noticed significant behavioral changes. Heather Anne Hart observed her constant eating and purging. She noticed that her hitherto happy go lucky sister had become intolerable yet passive. Gillian informed Heather of her distress over the government's "lying" and related her feelings of alienation from her government and country, which she had previously held in highest esteem. Heather also stated that her sister called much more often thereafter, sounding disillusioned and depressed. She suspected that Gillian was having trouble sleeping because she would frequently call very late at night.

Gillian next saw her family during the Thanksgiving holiday in 1986. Anne noticed that she was unusually thin. Gillian testified she had lost forty five pounds between July 1984 and Thanksgiving 1986(but is now 15-20 pounds overweight). She attributed her drastic

body weight fluctuations to the gorging and purging behavior pattern she developed subsequent to the events of the latter half of 1985. Heather Anne Hart also expressed her concern when she saw how thin and irritable her sister had become.

Based on the evidence before it this court concludes that Vera and Gillian have individually established a right to recovery for the reckless infliction of severe distress under Florida law. *See McCarson, supra.* The government recklessly engaged in outrageous conduct* which factually and legally caused Vera and Gillian to suffer "emotional distress of such substantial [and] enduring quality, that no reasonable person in a civilized society should be expected to endure it." *Kraeer Funeral Homes, Inc., supra* at 325. This court holds that Vera and Gillian have each incurred damages in the amount of $125,000 as a result of the government's conduct.

The foregoing awards reflects the absence of any evidence tending to show that Vera or Gillian, unlike Anne, will be permanently afflicted. Nevertheless, this court finds that Vera and Gillian, as the mother and eldest daughter of Lt.Col. Thomas Hart, are entitled to a sizeable recovery based solely on severe emotional distress. *Kirksey v. Jernigan*, 45 So.2d 188 (Fla. 1950).

Although conscious of the importance of Florida precedent, this court found that *Kohn v. U.S.*, 591 F.Supp. 568 (E.D. N.Y. 1984) involved the most similar facts, and otherwise provides a persuasive comparable verdict. The *Kohn* court applied the substantive law of New York, which like Florida recognizes this tort. *See e.g., Johnson v. State of New York*, 37 N.Y. 2d 378, 334 N.E. 2d 590,

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* The element of outrageous conduct is established since the conduct complained of here consisted of precisely the same acts that this court previously held were outrageous as a matter of law as to Anne M. Hart. *See* Memorandum Decision (doc. 68). These acts were consistently communicated to and discussed with Vera and Gillian by Anne.

372 N.Y.S. 2d 638 (1975); *Thompson v. Duncan Brothers Funeral Home, Inc.*, 116 Misc. 2d 227, 455 N.Y.S. 2d 324 (N.Y. Cir.Ct. 1982). In *Kohn* a Jewish serviceman was killed by a fellow soldier. Without informing his family, and contrary to their deeply held religious beliefs, the body was autopsied and embalmed before being returned to the family in New York. Decedent's parents sought damages for the emotional distress caused, *inter alia*, by the performance of the unauthorized autopsy; embalming the body; and communicating inaccurate and misleading information about the circumstances surrounding their son's death. 591 F.Supp. at 568. The court awarded Mr. and Mrs. Kohn $105,000 each as compensation for the extreme emotional distress caused by the Army's conduct.

The circumstances presented here are more aggravated than those in *Kohn*. Unlike the Kohns, Vera and Gillian are and remain uncertain of Lt.Col. Thomas Hart's fate. Moreover, their distress, although not shown to be permanent, is ongoing since the government still refuses to acknowledge that Lt.Col. Hart is unaccounted for, prolonging their mental suffering. At least the Kohns were able to bury their son, put the incident behind them, and carry on with their lives. It remains unclear when Vera and Gillian will finally be able to do the same.

For all the foregoing reasons, this court concludes that Vera and Gillian's damages for severe emotional distress are $125,000 each, and they shall individually recover such a sum.

Judgment in accordance with this memorandum decision will be entered.

DATED this 20th day of October, 1988.

/s/ Winston E. Arnow
WINSTON E. ARNOW
Senior Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-3193

ANNE M. HART, individually and as natural guardian for GILLIAN ELAINE HART, VERA LEE HART,
Plaintiffs-Appellees,

versus

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING IN BANC

(Opinion March 1, 1990, 11th Cir., 198-, —— F.2d ——)
(April 27, 1990)

Before JOHNSON, HATCHETT, and ANDERSON, Circuit Judges.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible] Johnson
United States Circuit Judge

APPENDIX D

STATUTES INVOLVED

§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

(1) Any civil action against the United States for the receovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States

District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * *

CHAPTER 171—TORT CLAIMS PROCEDURE

§ 2671. Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—

"Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the

National Guard as defined in section 101(3) of title 32, means acting in line of duty.

§ 2672. Administrative adjustment of claims

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: *Provided*, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any

other defenses to which the Tennessee Valley Authority is entitled under this chapter.

(As amended Nov. 18, 1988, Pub.L. 100-694, §§ 4, 9(c), 102 Stat. 4564, 4567.)

§ 2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

§ 2676. Judgment as bar

The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by

the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

§ 2677. Compromise

The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon.

(As amended July 18, 1966, Pub.L. 89-506, § 3, 80 Stat. 307.)

§ 2678. Attorney fees; penalty

No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title.

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both.

(As amended July 18, 1966, Pub.L. 89-506, § 4, 80 Stat. 307.)

§ 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the

Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

(As amended Sept. 21, 1961, Pub.L. 87-258, § 1, 75 Stat. 539; July 18, 1966, Pub.L. 89-506, § 5(a), 80 Stat. 307; Nov. 18, 1988, Pub.L. 100-694, §§ 5, 6, 102 Stat. 4564.)

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecu-

tion, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonmnet, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.